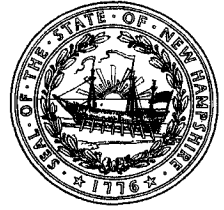




The State of New Hampshire
Department of Environmental Services
Water Council

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STATE OF NEW HAMPSHIRE

WATER COUNCIL

Decision & Order
Notice of Appeal

Docket No. 05-17 WC

Appeal of Daniel Osborn
In Re: Shoreland Protection Act Waiver Denial
Wetlands File # 2005-01071

Background

On September 29, 2005, Attorney Bernard H. Campbell filed a Petition for Appeal ("the Appeal") with the NH Wetlands Water Council ("the Council") on behalf of Daniel Osborn ("the Appellant"). The subject of the Appeal being the New Hampshire Department of Environmental Services, Water Division ("DES") Shoreland Protection Act Waiver Denial, file # 2005-01071.

On October 12, 2005 the Council voted to accept the appeal. Vice Chairman F. Wayne DiMarzio was appointed Presiding Officer, and a pre-hearing conference was scheduled for December 5, 2005.

On December 5, 2005 a pre-hearing conference was convened. Present were F. Wayne DiMarzio, Presiding Officer; Michael P. Sclafani, Appeals Clerk; K. Allen Brooks, Attorney for DES; Bernard H. Campbell, Attorney for the Appellant; Maggie and Daniel Osborn, Appellant; Collis Adams and Mary Ann Tilton, DES Wetlands Bureau; and Darlene Forst, DES Shoreland Program. It was decided at the pre-hearing conference that the appeal hearing will take place on March 8, 2006.

On December 12, 2005 Attorney Brooks filed a *Motion to Recuse Vice Chairman F. Wayne DiMarzio* from further participation in this appeal on behalf of DES. In its motion, DES argues that certain off-the-record comments by Mr. DiMarzio at the pre-hearing conference demonstrate that he is incapable of impartially participating in this appeal. The motion requests that the Council recuse and prohibit Mr. DiMarzio from presiding over any hearing regarding this matter, from voting or otherwise participating in this matter, and from communicating *ex parte* with other Council members regarding this matter.

At its regular monthly business meeting on December 14, 2005, the Council voted 10-0 to grant the motion. Councilor Ken Bradley was appointed Presiding Officer.

On April 12, 2006, following proper notice to all parties, the Council held an evidentiary hearing on the subject appeal in accordance with RSA 21-O:5-a, and Env-WC 200. The Council listened to testimony, presentation, and argument by the Appellant and DES. Immediately following the appeal hearing, the Council decided to deliberate and vote on the appeal. The Council voted 5-4 to deny the appeal.

Findings & Conclusions

Council deliberations included the following topics of discussion:

- Councilor Densberger stated that the task of the Council is to interpret what the subsection (g) in RSA 483-B-9. V, (g) applies to. He supported the State's interpretation that the words "this section" refers to section V and not to all of B-9.
- Councilor Cowan agreed the task is to interpret the RSA. There are certain sections, initially stated as roman I through V. Although he does not like the Shoreland Protection Act, he believes that subsection (g) refers to the paragraph V of which it is a part.
- Councilor Butler noted that the Shoreland Act has too much gray area. It is so vague that he agrees with the appellant.
- Councilor Northrop agreed that subsection (g) refers to paragraph V. Based on the wording of the statute, (g) does not apply to all of section 9.

- Councilor Varotsis stated that he does not like the Shoreland Act. He feels that it takes the ability away from a property owner to put a play area or porch where they should have the right to do so. He agrees with the appellant's interpretation.
- Councilor Lyons supports the Shoreland Protection Act and feels that even though it is not perfect, it is an important piece of legislation. She agrees with the State's opinion that subsection (g) applies only to the provisions of paragraph V.
- Councilor Patenaude discussed the disparity of the hypothetical impact of the Act on three different properties. He thinks the decision should be left to the town.
- Councilor Phillips stated that he was not sure what the subsection (g) really applies to. He believes subsection (g) applies to the entirety of B-9.
- Councilor Bridges agreed that Shoreland Protection Act can be confusing. However, he supports the State's position that subsection (g) applies only to paragraph V.

Councilor Bradley, the Chair of the hearing, called for a motion. Council Chairman Bridges moved to support the Department's decision and deny the appeal. The motion was seconded by Councilor Densberger.

There was discussion about a legislative committee that is currently working on the Shoreland Protection Act because of some of the confusion created by the language of the original Act. There was a general consensus among the Council that the Act was vague and ambiguous and needed to be improved so that is clear and just.

A vote was taken. Densberger – yea, Cowan - yea, Butler - nay, Northrop - yea, Verotsis - nay, Lyons - yea, Patenaude - nay, Phillips - nay, Bridges - yea, Bradley - nay.

Councilor Bradley voted no. A discussion ensued about the Chair of the hearing voting and it was discussed that past practice has been that the Chair only voted if there was a tie vote. Councilor Bradley withdrew his vote and the final vote was then five yeas and four nays.

Decision & Order

The subject Appeal is **DENIED**.

Reconsideration

Pursuant to Env-WC 203.29(a), any person whose rights might be directly affected by this decision may file a motion for rehearing within 30 days of the date of this decision. The motion must contain the information specified in Env-WC 203.29(b). Copies of any motion for rehearing shall also be sent or delivered to all other parties of record. Pursuant to Env-WC 203.29(e), this decision shall become final if no motion for rehearing is filed within 30 days.

So Ordered for the Council:

COPY
Michael P. Sclafani, Appeals Clerk

June 14, 2006